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Supreme Court of the United States

OCTOBER TERM, 1935.

No. 491.

ISABEL K. DIBBLEE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

CLARK R. FLETCHER,
Attorney for Petitioner,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

Of Counsel:
ROBERT DRISCOLL,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.
ALBERT J. DIBBLEE,
670 Mills Building,
San Francisco, California.
JUNELL, DRISCOLL, FLETCHER, DORSEY & BARKER,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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OPINIONS BELOW.

The Memorandum Opinion of the United States Board of Tax Appeals (R. 69-78) was promulgated February 13, 1934, and is found at 29 B. T. A. 1070. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 92-95) was filed February 5, 1935, and is found at 75 F. (2d) 617. A Petition for Rehearing in that Court was denied on September 6, 1935 (R. 96).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered February 5, 1935 (R. 95). A Petition for Rehearing was

denied September 6, 1935 (R. 96). The Petition for a Writ of Certiorari was filed October 4, 1935, and was granted October 14, 1935. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, 938.

QUESTION PRESENTED.

Whether bonds and shares of stock acquired by petitioner, as a general legatee under the will of a decedent who died March 28, 1926, and sold or otherwise disposed of by petitioner only on dates between April 18, 1928, and December 18, 1928, may be said not to have been held for more than two years within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, 45 Stat. 791, 811, merely because the decree of distribution of the estate of the decedent was not entered until May 21, 1927.

STATUTES INVOLVED.

The statutes involved are set forth in the brief of the petitioner in the case of *Rufus R. Rand, Jr., vs. Guy T. Helvering, Commissioner of Internal Revenue*, No. 439 on the October, 1935, Docket of this Court, which case involves the identical legal question involved in this case. The brief of the petitioner in the Rand case is being filed contemporaneously with this brief.

STATEMENT.

The facts are not in dispute. They were found by the Board (R. 70, 71) as stipulated by the parties (R. 15-64).

Petitioner is and at all times hereinafter mentioned was a taxpayer domiciled in the State of California (R. 16). On

March 28, 1926, Harriet deWitt Kittle, the mother of petitioner, died domiciled in the State of California leaving by will all her property to her four children, share and share alike (R. 16, 21, 22). The decedent's will was duly probated, and her estate, upon decree of final distribution dated May 21, 1927 (R. 32-52), was distributed according to the terms of the will. Petitioner received as part of her share of the estate specific stocks and bonds (R. 17-19).

At various times between April 18, 1928, and December 18, 1928, petitioner sold on the market certain of the bonds and shares of stock she had so received from her mother (R. 19, 20). It is evident that said sales were made more than two years after her mother's death but less than two years after the date of the decree of distribution of her mother's estate (R. 20). Petitioner realized gains upon said sales in the total amount of $28,441.86 (R. 21), and, in her income tax return for the calendar year 1928, computed and reported her gains upon said sales as capital gains taxable at the capital gain rates on the theory they were realized from sales of capital assets within the meaning of Section 101 (c) of the Revenue Act of 1928, 45 Stat. 791, 811 (R. 21). Respondent contended that the two year holding period contemplated in the provisions of that section commenced to run from the date of distribution and not from the date of death and consequently held that the gains were taxable as ordinary income at the normal and surtax rates and asserted a resulting deficiency of $1,690.30 in the petitioner's income tax for the calendar year 1928 (R. 64-68). The United States Board of Tax Appeals entered its decision for respondent (R. 78, 79). That decision was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit (R. 95).

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Ninth Circuit erred in holding:

1. That the bonds and shares of stock sold by petitioner were held by her, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, only from the date of distribution of the decedent's estate and not from the date of death of the decedent.

2. That the bonds and shares of stock sold by petitioner between April 18, 1928, and December 18, 1928, both dates inclusive, were not, at the time of sale, capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

3. That Section 101 and Section 113 (a) (5) of the Revenue Act of 1928 are to be read together and that basis date and acquisition date must necessarily be one and the same.

4. That the gains realized by petitioner upon the sale of said shares were not taxable at the rate applicable to capital gains but were taxable as ordinary income at the normal and surtax rates.

5. That the California rule that title to property transmitted by will vests in the legatee immediately upon the decedent's death is not material in determining the date from which the legatee holds property within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

6. That the determination of the United States Board of Tax Appeals that there was a deficiency in petitioner's income tax for the calendar year 1928 in the amount of one thousand six hundred ninety and 30/100 dollars ($1,690.30) was correct.

SUMMARY OF ARGUMENT AND ARGUMENT.

The legal question involved in this case is identical with that involved in the case of *Rufus R. Rand, Jr., vs. Guy T. Helvering, Commissioner of Internal Revenue*, No. 439 on the October, 1935, Docket of this Court, the brief of the petitioner in which case is being filed contemporaneously with this brief. We are taking the same position in both cases. For a summary of our argument and argument in this case, we refer to the summary of argument and argument contained in the brief of the petitioner in the said Rand case.

CONCLUSION.

For the reasons fully set forth in the brief of the petitioner in the said Rand case, we submit that the decision below should be reversed.

Respectfully submitted,

CLARK R. FLETCHER,
Attorney for Petitioner,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

Of Counsel:

ROBERT DRISCOLL,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.

ALBERT J. DIBBLEE,
670 Mills Building,
San Francisco, California.

JUNELL, DRISCOLL, FLETCHER, DORSEY & BARKER,
1300 First National-Soo Line Building,
Minneapolis, Minnesota.